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ABSTRACT

Three Federal Communications Commissioners (FCC) filed supplementary statements to the FCC Children's Television Report, elaborating on their individual views. Commissioner Benjamin L. Hooks concurred in the proposed limit on commercial minutes in children's programs, but suggested a lower figure. He also suggested that commercials be "clustered" at the beginning and end of programs. Commissioner Washburn suggested that stricter policies of program and commercial separation be adopted for preschool viewers and also suggested that the FCC should have examined more closely the content of violence and brutality in programming. Commissioner Glen O. Washburn endorsed the Report but warned that the Commission should not go further in restricting broadcasting or advertising. (SK)

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In Re: Children's Television Report

I concur in essence with the action of my colleagues because our Report accomplishes the following. First, it clearly outlines this agency's concern with the subject of programming to children, an area where we have heretofore failed to speak as specifically. It has also admonished its licensees that "broadcasters have a duty to serve all substantial and important groups in their communities, and that children represent such a group." 1/ Moreover, it effectively establishes a commercialization limit which is nearly 50% below an industry norm that prevailed before we initiated our efforts 2/ and closes the door on the boundless use of children's shows as embellished trade fairs for tots. Finally, it is open-ended and emphasizes our continuing interest in this area. None of these conditions pre-existed our intervention and, accordingly, I join in this Report which symbolizes some very real progress.

The differences which result in my concurrence rather than an absolute accord with the Report are ones of degree and not kind relating to the nature and amount of commercialization attending children's programming. In other proceedings, I have acknowledged the need of commercial broadcasters to maintain an adequate revenue base to support their operations. While an ideal world of limitless financial resource would make it easy for us to simply ban all advertising from children's shows as some petitioners urge, such a world is not the present or foreseeable reality. That does not necessarily mean that every program broadcast must be, in and of itself, compensatory. Some individual programming which is expected under the public interest standard may not result in a direct profit. But, those who produce and present the scores of children's shows for a living must receive ample remuneration to assure that the quantity and quality of desirable programming is maintained at an adequate level.

1/ Report, par. 16.

2/ See generally The Economics of Children's Television: An Assessment of Impact of a Reduction in the Amount of Advertising, a "Study" by Commission staff economist, Dr. Alan Pearce.

In the area of children's television, the majority has sage-ly recognized that "the use of television to further the educational and cultural development of America's children" (Report, par. 18) is of statutory derivation. Petitioners such as Action for Children's Television (ACT) have pled that the commercials currently woven into the pattern of children's television are antithetical to that development. I agree that a constant and contrived bombardment of slick appeals exhorting sugar-coated, crunchie-munchies and other fluff to suggestionable minds devoid of an understanding of financial or nutritional values is generally antagonistic to the "educational and cultural development" objective correctly espoused. Taking candy from a baby -- a 2, 3 or 4 year old -- is unsportsmanlike; hard - selling it to them in rainbow colors seems to me to be equally un-seemly.

Consequently, I sympathize with ACT and the others who have vociferously deplored examples of exploitive hucksterism to our youngsters over the public airwaves. Any such craven practices by those with the legal standing of trustees for the community ill serve the public interest for which they have been licensed. Perhaps, as some have suggested, the problem is not with commercials per se but with the products themselves (e.g., candified comestibles, dubious playthings) or the fact that some ads are allegedly misleading or deceptive. Both of these problems appear to be beyond the prin-cipal expertise and primary jurisdiction of this particular agency. If that is the case, and all this Commission can legitimately do is minimize the impact in terms of quantity, then I fully support the assertion that "licensees should confine advertising to the lowest level consistent with their programming responsibilities" (Report, par. 43). Under circumstances where that may be the most we can do, it is the least we should do.

However, in the commercial area, our document calls for compliance with present, voluntary industry standards (Report, par. 44). I do not find this position wholly consistent with the policy of maintaining children's commercials at the aforesaid "lowest level" practicable, particularly when that industry standard is presently the same for both children and adult programs. Since the law has traditionally recognized a higher standard of commercial protection for children, a parity of about 9 non-program minutes per hour for all age levels is not consistent with that bi-level tradition. A policy

fully consonant with analogous legal precedent would logically dictate a level which is appreciably lower for children. My reading of Dr. Pearce's Study, note 2, supra, suggests that a level of about 6 commercial minutes per hour would not, in the long run, materially effect profitability (in view of the inelastic character of the kids ad market); or, more importantly, jeopardize a licensee's ability to meet its mandatory responsibilities. Therefore, the commercial level I would set at this point is below that enunciated in the NAB Code. 3/

Moreover, as regards isolation of advertising from program content, I would have adopted the petitioned recommendation that commercials be "clustered" fore and aft of the programs so as to avert confusion and suggestion on the part of the children." "Madison Avenue" genius has the capacity to create sales presentations so compatibly attuned to programming that youngsters themselves are "programmed" to develop the same positive feelings toward the product as the surrounding show; they see the images -- program and pitch -- as an undifferentiated whole rather than unrelated episodes. This practice seems unfair considering the immaturity of the audience and segregation of the two appears warranted.

Both the Commission, and particularly the Chairman, as well as the industry are to be commended for their actions thus far. Nobody can dispute the point that television has done much to educate, enlighten and expose children to the breadth, complexity, beauty and problems of this world. But, the Commission's continuing obligation is to encourage the most effective use of the media (47 U.S.C. §303(g)). Though I regret the necessity for formal action, the pressures of the marketplace and the profit motive, as ACT asserts, may be compelling drives which will not be spontaneously overcome absent regulatory encouragement for improvement. Since this Commission has exclusive jurisdiction over television broadcasting, some of the perceived problems are in our ballpark: we cannot categorically adjure, but must act to the full extent available. We cannot legislate creativity, good taste or the product marketplace, but we can and have announced an anticipation that broadcasters make a concerted effort to beneficially serve the needs of the public, including that segment too young to petition or protect itself.

3/ Because NAB Code levels on commercial quantity, on which we in turn have based on our policy, are not within our control, it might have been more appropriate to strengthen our position by codifying the limits the majority finds acceptable. Embodied by Commission Rule, these levels would have become absolute ceilings and violations susceptible, inter alia, to forfeiture. 47 USC §503

October 24, 1974

CHILDREN'S TELEVISION REPORT AND POLICY STATEMENT, ADDITIONAL VIEWS
OF COMMISSIONER WASHBURN

The Children's Television Report and Policy Statement, which we adopted today, is the first definitive approach to the needs of children in television programming -- a milestone in the Commission's history. I endorse it in full.

I would have liked to see the Commission go further with safeguards in regard to programs for pre-school children. Many children, but especially 3, 4 and 5-year olds, have difficulty distinguishing between program content and commercials. Interruptions likewise present more difficulty for very young viewers. Consequently it would have been well, in my view, for the Commission to have included a policy restricting commercial messages to the beginning and/or the end of programs directed to pre-schoolers.

In its upcoming consideration of violence and obscenity on television, I will recommend that the Commission clearly set forth its expectation that licensees exercise extreme care as to the level of violence and brutality in programs (including cartoons) directed to pre-school children. Small children have difficulty in making clear distinctions between reality and fantasy on TV. Therefore, the negative impact of this type of material is greater on pre-schoolers than on school-age children. This should be taken into account by licensees.

SEPARATE STATEMENT OF COMMISSIONER GLEN O. ROBINSON

I have no doubt that our Statement of Policy will not please everyone. More probably it will not please anyone. Broadcasters will likely see it not merely as a crystallization of recent, voluntary concessions on advertising, but a first step in a series of future endeavors designed to push commercials out of children's television. And they will probably also look with some foreboding on our policy statements with regard to the amount, character and scheduling of children's programming as a precedent for future forays into the hitherto forbidden realm of program control. On the other side of the fence, it seems equally likely that those who have pressed the Commission for vigorous regulatory efforts in the area of children's programming will scold us for our caution.

However, within the bounds of what we address here in this Policy Statement (which does not include the vexing problem of violence), I am satisfied that the Commission has made a reasonable response to the problems presented. I believe the Commission has gone about as far as is appropriate, in light of the evidence presently before us and mindful of the ever-present dangers that lurk in the area of program regulation. Indeed, I would have made this point

a little bit more emphatic in our Policy Statement. It seems to me that a Statement of Policy is meaningful not only for what it says can and will be done, but in what it proclaims cannot or should not be done. I have no fixed notions where the proper boundaries of our concern lie with regard to children's programming; but I think the present Statement comes fairly close to the line which I would ultimately draw with regard to the matters herein considered. I do not mean to suggest by this that there are no respects in which I could not be persuaded to adopt a "harder line" towards the regulation of children's programming, or attendant advertising. What I do mean to suggest is that, as far as I am concerned, we are pressing very close to the limits of our sound discretion.

My reason for emphasizing all of this is simple: while I recognize the legitimate concerns of those who have pressed for regulation in this field, and while I endorse the Commission's present efforts in that direction, I would not have these efforts interpreted as merely the first step in a continuous series of measures by the FCC to act as a censor for children's programming. There is an especially seductive appeal to the idea of "protecting" children against television. There are areas where the prospect of governmental control of programming has only to be suggested to evoke opposition and antipathy. This is not one of them. It is with respect to children's

television that our strongest instinct is to reach out and put the clamp of governmental control on programming. For this reason, regulation of children's programming raises the most subtle and the most sensitive of problems. Everyone recognizes the free speech dangers of governmental control of political broadcasting. Not enough people appreciate the far more subtle problem of governmental control when it is extended into an area like this one, where there is widespread popular sentiment supporting some measure of governmental control. But if the First Amendment is to mean anything at all, it obviously does not mean that we can make judgments on the basis of majoritarian sentiment alone.

If I understand some of the tendencies that have been recently manifest in this field, I would be surprised if proponents of future action did not parse each word or phrase of our Policy Statement to seek support for future forays in this area. For those inclined to read between our Policy Statement's lines, my counsel is that they should not. I think that none of the words in this majority opinion were intended to imply hidden invitations or subtle meanings that are not fairly imparted upon the face of the document as a whole. At least such is my reading: in an area as sensitive as this, I am a strict constructionist, not only of the Constitution, but of the Commission's Statement of Policy.

On the subject of language, implication and future interpretation, there are two other matters in the Commission's Report and Policy Statement which call for separate special comment. The first is the distinction which seems to be drawn between "educational" (or "cultural") programming and mere "entertainment"; the second is the questions of advertising to children, and more particularly, the assumption that selling to children is a per se evil--a possibly inevitable, but nevertheless, still evil, practice.

I am not altogether comfortable with the distinction made in this Report and Policy Statement between educational programming and entertainment programming and the insistence that a certain amount of programming be didactic ("instructional") in character. For myself I would prefer that my children's time be occupied with Bach rather than Alice Cooper, that they be more concerned about a Swiss Family Robinson than the Partridge Family in the Year 2200, and more interested in the adventures of Jacques Cousteau than those of Billy Batson. Nevertheless, I feel somewhat diffident, as an officer of federal government, in urging that my preferences concerning what values are best for children to learn are the only ones that can claim the label "educational." In spite of the considerations counseling diffidence, however, I am satisfied that we have not gone beyond our

proper discretion with today's Report and Policy Statement. The importance of the "cultural" values we have counseled our licensees not to slight is rooted firmly enough in consensus to allay any fears that we are significantly interfering with the prerogatives of any state or any family.

The Report and Policy Statement treats advertising to children as, at best, a necessary evil. The only difference between its view and that of ACT (and other opponents of advertising on children's programming) seems to be a pragmatic judgment that some advertising is necessary to sustain the programming. That is not quite the way I view the matter. I agree that, within the present economic structure of television, advertising is necessary to support children's programming of respectable quality. I cannot agree, however, that apart from this fact it is somehow wrong, per se, to advertise to children. Indeed, if advertising to children were as undesirable as some opponents have made it out to be, I doubt that the programming which it now supports could really redeem it.

By arguing that children are not properly the object of advertisers, ACT appears in effect to regard children, as a class, as outside the economic framework of our society. This seems to me dubious. Like adults, children are consumers. Like adults, their tastes are not genetically determined. Among the influences upon the tastes of consumers-- be they adults or children--is advertising. Irrespective of its target,

its purpose is to motivate behavior that would not otherwise, but for the advertising, have occurred. For better or for worse, commercial messages, even those involving significant amounts of non-informational mental massaging, have long been tolerated in our society. Some ^{*/} people even regard them as economically and socially useful. Whether they are or not, however, is beside the point. It seems to me a little late in the day to decide that advertising, per se, is contra bonos mores. If it is not, then I suggest that we candidly acknowledge that within proper limits it is not a sin, and certainly not a crime, to try to influence the consumption desires of children. It may be argued that children are "special" consumers in that they are not the direct purchasers of much of what is advertised to them--their parents are. To my mind, this fact is without significance. It is a legitimate aim to stimulate demand for a product, and as a practical matter, this requires that the consumer of the product be reached. In the case of toys and breakfast cereals, that consumer is the child. In theory, the child will then tell the parent what he desires, and the parent will either buy or not. According to some commentators, this places an unfair burden on parents, who are required to spend significant portions of their parental energies

*/ Samples of some of the voluminous literature on this, pro and con, are collected in G. Robinson & E. Gellhorn, *The Administrative Process*, 352-371 (1974).

vetoing purchases of new toys, breakfast cereals, candy products and soft drinks. We recognize, of course, that there are limits on how products should be advertised to children. But the advertising does not, per se, serve an improper function. Our sympathy for parents who "just can't say no" is rightly thin. Just as we cannot be surrogate parents so we should not attempt to insulate parents from the necessary responsibility of parental supervision.

I do not wish to be understood as endorsing all the TV advertising I have seen directed at children. Quite the contrary. I am sometimes revolted by commercials aimed at children (as well as

*/ One further point needs to be made in this connection. To a considerable degree the real discomfort of ACT and other like groups relates not to advertising but to the product advertised. This is most clearly illustrated in the demands which ACT has made on the Federal Trade Commission--concerning, e.g., the allegedly inherent "unfairness" of premiums--and it is also evident in the demands which have been pressed upon us as well. The Federal Trade Commission will have to sort out its own jurisdiction in this matter, but I think our response must clearly be negative: we do not have authority to restrict marketing of lawful products merely because the products are promoted through the medium of radio and television. It is conceivable that there might be some exceptions to this in the case of patently dangerous products, but even here I am hesitant to state in unequivocal terms that we have authority. The cigarette advertising episode, which has been cited numerous times to us in support of such authority, is not apposite even if it were a wise precedent to follow. The only action which the Commission took in regard to cigarettes was to make advertising subject to the fairness doctrine, and even that limited precedent has now been restricted by our recent Fairness Report, 48 F. C. C. 2d 1 (1974).

many aimed at adults). Reason and common sense obviously have a role in a licensee's discharge of its public responsibilities. In my judgment, licensees have an obligation to appreciate the ways in which children differ from adults, and not to suffer advertisers to prey upon or exploit the peculiar vulnerabilities of immature judgment or unsophistication. ^{*/} There is a difference between salesmanship and exploitation, just as there is a difference between the spirit of enterprise and the spirit of larceny. Licensees will simply have to observe the distinction.

*/ I do not suggest that I think it proper to prey upon gullible adults either, but setting aside deception, there are necessary limits to our solicitude.